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IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1465
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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

— v. —

GENEVIEVE O. RASMUSSEN, *et al.*,
Respondents.

GEO CONTROL, INCORPORATED, *et al.*,
Petitioners,

— v. —

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN INSURANCE ASSOCIATION, ALLIANCE OF AMERICAN INSURERS AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Pursuant to Rule 42(3) of the Supreme Court Rules, the American Insurance Association, Alliance of American Insurers and National Association of Independent Insurers respectfully move for leave to file the attached brief as Amici Curiae in support of petitioners. Counsel for peti-

tioners have consented to the filing of this brief. Counsel for respondents have not consented.

The interests of Amici are as follows:

The *American Insurance Association* is an association of 145 property-casualty insurance carriers. Its members write approximately 45 percent of the workers' compensation insurance premiums in the United States.

The *Alliance of American Insurers* is an organization of 119 property-casualty insurance carriers. Its members write approximately 25% of the workers' compensation insurance premiums in the United States.

The *National Association of Independent Insurers* is a voluntary trade association of over 400 insurance companies. Its members write approximately 10% of the workers' compensation premiums in the United States.

Section 32 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 932 (the "Act"), requires each employer to secure the payment of compensation required under the Act either by: (a) furnishing satisfactory proof of its financial ability to pay such compensation; or (b) obtaining workers' compensation insurance from an authorized carrier. To satisfy their obligations under the Act, and the several statutes into which it has been incorporated, many employers have obtained workers' compensation policies from members of Amici. Amici have thus been vitally concerned with the operation of the Act.

The question before this Court is whether, under the Act as amended, the weekly rate of death benefits is subject to the same maximum limitations applicable to benefits payable for disability. Elimination of the weekly maximum on death benefits, which has been an integral part of the

Act since its passage in 1927, would have a significant impact upon members of Amici and their existing and future workers' compensation contracts. In view of the importance of the case to the industry, the American Insurance Association participated as an amicus curiae before the Court of Appeals for the Ninth Circuit.

Amici have examined the language and legislative history of the Act and its 1972 amendments primarily in light of the workers' compensation system as a whole. Amici do not believe that the parties have considered the issue before this Court in precisely the same manner.

Amici therefore request that this Court grant leave to file the attached brief.

Respectfully submitted,

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Statute Involved

This case involves the proper construction of Section 6(d) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 906(d), *as amended by* Pub. L. No. 92-576, 86 Stat. 1251 (1972) (the "Act"). The relevant

portions of the Act prior to and subsequent to the 1972 Amendments are reprinted in Appendix A and Appendix B, respectively, to this brief.

Question Presented

Are the maximum limitations for weekly benefits, as set forth in Section 6(b)(1) of the amended Longshoremen's and Harbor Workers' Compensation Act, applicable to death benefits by virtue of Section 6(d) of the Act?

Statement

As described in detail below, workers' compensation plans provide weekly benefits for on-the-job injuries to employees without regard to fault. Workers' compensation legislation has thus eliminated the fellow servant rule, assumption of risk, contributory negligence and other common law doctrines which often left workers without recourse for their injuries. However, in view of their no-fault provisions and in order to keep their costs within reasonable limits, workers' compensation plans, as originally adopted, uniformly imposed maximum limits on the weekly amounts which could be awarded for death and disability benefits.

For forty-five years following its passage in 1927, the Longshoremen's and Harbor Workers' Compensation Act[1] clearly provided for a fixed dollar amount as a maximum

[1] Act of March 4, 1927, c. 509, 44 Stat. 1424, *as amended by* Act of May 26, 1934, c. 354, 48 Stat. 806; Act of June 25, 1938, c. 685, 52 Stat. 1164; Act of June 24, 1968, c. 623, 62 Stat. 602; Act of July 26, 1956, c. 735, 70 Stat. 654; Act of July 14, 1961, Pub. L. No. 87-87, 75 Stat. 203; Act of October 27, 1972, Pub. L. No. 92-576, 86 Stat. 1251.

on the weekly rate of both death and disability benefits. This maximum dollar amount, which was increased from time to time, was set forth in Sections 6(b) for disability and 9(e) for death.

In recent years, it has become clear that the use of fixed dollar maximums was inefficient because they required relatively frequent adjustment by Congress as wages increased. Moreover, pending Congressional action, the fixed dollar maximums on occasion resulted in unrealistically low limits on weekly payments for both death and disability benefits.

Accordingly, in 1972 Congress amended the Act. One of the principal purposes of the Amendments was, plainly, to eliminate fixed dollar maximums in favor of flexible maximums based upon a specified percentage of the national average weekly wage. The national average weekly wage changes annually and, therefore, benefits can be upgraded as appropriate without the need for further Congressional action. The result of this change has been to increase the weekly maximum from $70 in 1972 to $367.22 in 1978.

In order to make the switch from fixed dollar maximums to flexible limits, the 1972 Amendments rewrote the portions of the Act which dealt with weekly maximums. It is fair to say, however, that these Amendments are not in all respects a model of clarity.

Thus, for disability benefits Congress deleted the old fixed maximums and added a new Section 6(b)(1), 33 U.S.C. 906(b)(1), which specifically adopts the new flexible maximums. However, for death benefits, Congress deleted the fixed maximums previously contained in Section 9(e), 33 U.S.C. § 909(e), but did not rewrite 9(e) to

make it similar to Section 6(b)(1). Instead, Congress added a new section 6(d), 33 U.S.C. § 906(d), which ties the weekly death benefit maximums to the maximums set forth in Section 6(b)(1).

Since the new statutory language for death and disability benefits is not precisely parallel, some claimants have argued that, for purposes of the weekly maximum limitation, Congress intended to distinguish between disability benefits and death benefits. Although nowhere in the legislative history is there any mention of such a drastic change, these claimants have insisted that Congress intended, not to change the maximum from a fixed dollar limit to a flexible limit, but to remove the limit entirely for death benefits.

This position was rejected by the Director of the Labor Department's Office of Workers' Compensation Programs —the official who is charged with administering the Act and who was entirely familiar with the background of this legislation—and by the Courts of Appeals for the Third and District of Columbia Circuits.[2] After an exhaustive analysis of the language, legislative history and purposes of the amended Act, they concluded that the death benefits limitation imposed by the former Section 9(e) was retained in the new Section 6(d).

When the Senate subcommittee responsible for the 1972 Amendments reviewed the Act in 1974, it similarly concluded that:

> "Compensation for disability and death is based on the average weekly wage of the covered worker. Maximum benefits may not exceed a specified percentage of the national average weekly wage."[3]

[2] *Director, Office of Workers' Compensation Programs* v. *O'Keefe*, 545 F.2d 337 (3d Cir. 1976); *Director, Office of Workers' Compensation Programs* v. *Boughman*, 545 F.2d 210 (D.C. Cir. 1976).

In its decision below, however, the Court of Appeals for the Ninth Circuit reached a contrary result. Apparently of the view that the question could be resolved by reference to Section 9(e) alone, without regard to the remainder of the Act, the court virtually ignored Section 6(d) and the decisions of the other Courts of Appeals. Indeed, the Ninth Circuit dismissed Section 6(d) in a single footnote and the prior authority in a solitary sentence.

Review of the Ninth Circuit's decision was sought by the Solicitor General on behalf of the Director, Office of Workers' Compensation Programs, and by the employer and its insurance carrier. On June 12, 1978, this Court granted both petitions for writs of certiorari.

Summary of Argument

The Ninth Circuit held that because the 1972 Amendments rewrote Section 9(e) to remove the fixed dollar limitations for death benefits and did not provide any new maximum weekly limits in that section, weekly death benefits, unlike weekly disability benefits, are no longer subject to a maximum. To be sure, when the Act was amended in 1972, Congress removed all references to weekly death benefit maximums from Section 9(e). But that is hardly dispositive of the present case. The 1972 Amendments also

[3] Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Compilation of Selected Laws Pertaining to Labor Relations 769 (1974). *See also* A. Millus & J. Manes, The Longshoremen's and Harbor Workers' Compensation Act And Its Extensions 327 (1978).

added two new provisions to the Act—Sections 6(b)(1) and 6(d). As the Courts of Appeals for the Third and District of Columbia Circuits properly recognized, the issue here is whether Section 6(d) applies the flexible maximums set forth in Section 6(b)(1) to weekly death benefits.

The Ninth Circuit's opinion is wrong in three fundamental respects:

1. *The opinion below ignores the historical development of workers' compensation legislation.*

When Congress enacted the Longshoremen's Act in 1927, it imposed upon employers "liability without fault" and deprived them of those defenses which had been available under the common law. As a "counterbalancing advantage," employers received a limitation on their liability which was both certain and predetermined; they were "no longer to be exposed to the hazards of large tort verdicts." *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 140 (1956) (Black, J., dissenting). This trade-off was important, not only because it allowed workers' compensation statutes to survive attacks against their constitutionality, *see New York Central R. Co.* v. *White*, 243 U.S. 188, 203-04 (1917), but also because it made the system practical.

One important method for keeping the employer's liability certain and within bounds and the system practical has been the imposition of a maximum on weekly death benefits. While limitations on average weekly benefits prevent full replacement of incomes earned by employees in the highest income categories, they also assure that there will be sufficient funds available to provide a reasonable amount to all employees.

The maximum benefits under the Longshoremen's Act, which are generally supplemented by additional benefits and are non-taxable, provide more than adequate compensation. For example, as set forth in Appendix C, respondents can expect to receive some $746,786 if the Section 6(b)(1) limitations are applied. Absent the weekly ceiling, the expected award becomes $1,144,064—almost $400,000 or over 50 percent higher. Where benefits are paid over a longer period of time or where the average weekly wage is greater, the disparity becomes even more significant. *See* Appendix D. The worker's compensation system was never intended to provide for such unreasonable awards.

Accordingly, the worker's compensation laws, including the Longshoremen's Act, have consistently imposed maximums on weekly death benefits. Elimination of such maximums would constitute a most significant and drastic change which would be wholly inconsistent with the historical development of the workers' compensation system.

2. *The opinion below misconstrues the statutory language.* The Ninth Circuit, focusing on the language of Section 9(e), gave only the most superficial consideration to Section 6(d). In a footnote the court announced that Section 6(d) does not impose the Section 6(b)(1) maximums on weekly death benefits. According to the Ninth Circuit "all that [Section 6(d)] says" is that minimum death benefits will be upgraded annually. However, as the Courts of Appeals for the Third and District of Columbia Circuits concluded, such upgrading is already required by Section 10(f) of the Act. The Ninth Circuit's interpretation of the Act thus renders Section 6(d) completely superfluous, in violation of the most basic rules of statutory construction. *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955); *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961).

Moreover, the statutory construction adopted by the Ninth Circuit makes no sense. The court admitted that eliminating the maximum for death benefits while retaining it for disability benefits—where the needs of the employee and his or her family are likely to be greater—"'places a premium on death,'" 567 F.2d at 1387. This "creates a serious and unique anomaly" in the workers' compensation plan adopted by the Act. *Director, Office of Workers' Compensation Program* v. *Boughman*, 545 F.2d 210, 213 (D.C. Cir. 1976). It is hardly reasonable to construe a statute to reach such a result.

3. *The opinion below misconstrues the legislative history of the 1972 Amendments.*

The Ninth Circuit attempted to buttress its decision by referring to various passages from the House and Senate reports which accompanied the 1972 Amendments. These passages, however, establish no more than that Congress intended to remove the fixed dollar maximum from Section 9(e). They shed no light on whether, by virtue of Section 6(d), Congress intended to replace the fixed dollar maximum with the flexible maximums of Section 6(b)(1).

The Ninth Circuit also referred to various statements made about the bills as originally introduced into the 92d Congress. What the court failed to note, however, is that the bills were substantially revised after the hearings. The bills as introduced, which proposed to eliminate maximums on weekly death and disability benefits, did not contain what are now Sections 6(b)(1) and 6(d). These provisions were added after substantial opposition to the removal of the maximums surfaced during the hearings. Thus, statements about the effect of the bills as introduced provide no assistance in discerning the effect of Sections 6(b)(1) and 6(d).

The Ninth Circuit either overlooked or failed to give adequate consideration to other portions of the legislative history. For example, both the Senate and House Committees, as well as the principal Senate sponsor of the 1972 Amendments, explained the amendment to Section 6 of the Act as follows:

> "To the extent that employees receiving compensation for total permanent disability *or survivors receiving death benefits* receive less than the compensation they would receive if there were no *phase-in*, their compensation is to be increased as *the ceiling moves to 200%*." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 5 (1972); H. Rep. No. 92-1441, 92d Cong., 2d Sess. 3 (1972). (Emphasis added.)

The references to "phase-in," "ceiling," and "200%" make no sense whatsoever unless the Section 6(b)(1) limitations apply to weekly death benefits. Those responsible for the 1972 amendments thus recognized that the phase-in limitations of Section 6(b)(1) would place a ceiling on the weekly benefits which survivors might otherwise have received. *See also* note 3 *supra* and accompanying text.

The Ninth Circuit also ignored the statement by the Senate Committee that its amendments to Section 6 were "fully consistent" with the recommendations contained in the Report of the National Commission on State Workmen's Compensation Laws.[4] Among the most significant of

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[4] S. Rep. No. 92-1125, 92d Cong., 2d Sess. 2 & 5 (1972).

The National Commission on State Workmen's Compensation Laws was created by Section 27 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 676, to study the adequacy of state compensation laws and to advise Congress on the desirability of federal action. The National Commission submitted its Report to Congress on July 31, 1972 just prior to passage of the 1972 Amendments.

the National Commission's recommendations was that both weekly disability and death benefits be limited, after an appropriate phase-in, to "at least 200% of the State's average weekly wage." There is absolutely nothing in the legislative history indicating that Congress intended to reject this recommendation with respect to death benefits, while at the same time fully adopting the recommendation with respect to disability benefits. Indeed, nowhere in the legislative history is there any indication of an intent to treat weekly death benefits and disability benefits differently.

There is, in short, no support in the legislative history of the 1972 Amendments for the Ninth Circuit's conclusion that Congress intended to eliminate completely the maximums on weekly death benefits while simultaneously retaining these maximums on disability benefits. Indeed, the legislative history is plainly to the contrary. In view of the historical development of workers' compensation legislation, any elimination of a ceiling on death benefits would obviously be a most drastic change. The absence of any clear indication that the 1972 Amendments effected this result is persuasive evidence that Congress never intended such a result.

Argument

I.

The Ninth Circuit Has Failed to Construe the Longshoremen's Act in Conformance With Its Historical Development.

The Longshoremen's and Harbor Workers' Compensation Act, originally passed in 1927, was patterned after the New York Workmen's Compensation Law. *See* H.R. Rep. No. 1190, 69th Cong., 1st Sess. 2 (1926). It was "designed to accomplish the same general purpose as the workmen's compensation laws of the States." *Crowell* v. *Benson,* 285 U.S. 22, 40 (1932). *See also Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249, 258 (1977) (the "Act was, in a sense, a typical workmen's compensation system. . . . "). It is clear, from an examination of the background and nature of the workers' compensation system, that the Ninth Circuit has failed to construe the Longshoremen's Act in conformance with the Act's history.

A. *Limitations on Weekly Death Benefits Have Been an Important Part of the Longshoremen's Act and the Workmen's Compensation System.*

Just after the turn of this Century, industrial injury rates in the United States reached an all-time peak. Injured workers or survivors of deceased workers found, however, that tort remedies available under the common law were less than adequate. Courts tended to lack sympathy for their complaints, and the defenses of contributory negligence and assumption of risk and the fellow servant doctrine made it difficult to recover from an employer.

Furthermore, even where an injured worker could recover, the fact that the compensation system was based upon liability for negligence imposed high legal costs and made for long delays. Indeed, in many instances, even an employee who successfully obtained a judgment was unable to collect because the employer was judgment proof. *See generally* National Commission Report at 33-34.

The workers' compensation laws were developed in the early part of the Twentieth Century to remedy many of these problems.[6] The "most radical" feature of these laws was the "establishment of a legal principle alien to the common law: liability without fault." National Commission Report at 34. Under the new system, the employer lost defenses which had been available under common law and was required to bear the costs of all work-related injuries without regard to his fault—either directly or

[6] With the support of both the National Association of Manufacturers and the American Federation of Labor, the workers' compensation laws achieved rapid acceptance. Between 1911 and 1920, 42 states enacted workers' compensation statutes. Today, all 50 states and the District of Columbia have such legislation. National Commission Report at 32-33.

In 1908 Congress enacted a compensation act covering certain federal employees. National Commission Report at 34. This was followed in 1927 by the Longshoremen's and Harbor Workers' Compensation Act. *See generally Northeasst Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256-58 (1977). The provisions of the Longshoremen's Act were subsequently incorporated into several other laws. *See* Defense Base Act, 42 U.S.C. § 1651; War Hazards Compensation Act, 42 U.S.C. § 1701; Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(c); Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171. *See also* District of Columbia Workmen's Compensation Code, D.C. Code § 36-501.

As a result of these various extensions, more than one million workers, including the many highly-paid workers in the District of Columbia, are covered by the Act. Comment, *The Longshoremen's and Harbor Workers' Compensation Act: Coverage After The 1972 Amendments*, 55 Tex. L. Rev. 99, 99 & n.2 (1976).

through premiums to insurance companies.[7] And the benefits available to employees can be quite generous. As noted, at present the maximum weekly benefit is $367.22. This means that a 25-year old widow whose husband earned $15,000 per year could expect to receive a total of $2.5 million in death benefits during her lifetime.[8]

In return for "no fault," the employer received a limitation on his liability which was both "certain" and "predetermined." *See* National Commission Report at 32, 34, 38. Justice Black, writing in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) (dissenting opinion), noted that the Act was

> "revolutionary in its field . . . Congress weighed the conflicting interests of employers and employees and struck what was considered to be a fair and constitutional balance. Injured employees thereby lost their chance to get large tort verdicts against their employers, but gained the right to get a sure though frequently a more modest recovery. . . . *And while Congress imposed absolute liability on employers, they were also accorded counterbalancing advantages. They were no longer to be subjected to the hazards of large tort verdicts.*" 350 U.S. at 140 (footnote omitted) (emphasis added).

[7] Some large companies, such as Ford Motor Company, are self-insured. Most employers, however, make insurance arrangements with a private carrier. As of 1972, workmen's compensation insurance was written by private carriers in 32 states; in 12 states, private and state operated carriers competed; in 6 states (Ohio, North Dakota, West Virginia, Wyoming, Washington and Nevada), insurance was provided by state operated carriers. *See* National Commission Report at 33.

[8] A. Millus, *supra* note 5, at 322. This example assumes that the widow is childless and does not remarry, and that the annual rate of escalation, *see* 33 U.S.C. § 910(f), is 6 percent. It should be noted that the rate of escalation has been over 7 percent for each of the last two years.

Thus, the "basic *quid pro quo* of workmen's compensation is that the employer assumes nonfault liability, but in return has his liability restricted to wage-loss restoration *within fixed limits.*" Larson, *Compensation Reform in the United States,* in Occupational Disability and Public Policy 41 (E. Cheit and M. Gordon ed. 1963) (emphasis added). *See also Smithers & Co.* v. *Coles,* 242 F.2d 220 (D.C. Cir. 1957).

It was this *quid pro quo* which allowed workers' compensation statutes to survive attacks against their constitutionality. Many of the early statutes were, in fact, declared unconstitutional by state courts as a deprivation of property without due process. National Commission on State Workmen's Compensation Laws, Compendium on Workmen's Compensation 17-18 (1973) ("National Commission Compendium"). However, in *New York Central R. Co.* v. *White,* 243 U.S. 188 (1917), this Court sustained the constitutionality of the New York law, upon which the Longshoremen's Act was modeled, concluding that it was constitutional

> "to supplant a system under which [the employee] assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which in all ordinary cases of accidental injury he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case but in all cases assuming any loss beyond the prescribed scale." 243 U.S. at 204. *See also id.* at 203-04.

The importance of the cost-containment aspects of workers' compensation plans has been widely acknowledged. Workers' compensation simply "cannot afford to be both

a nonfault insurance system and a source of tort damages if it is to remain within reasonable cost bounds." *Larson, supra,* at 41. For example, the New York Court of Appeals recently noted that, since the establishment of the workers' compensation system, it has been recognized that

> "*measures had to be taken which would ensure that the cost of providing this protection to injured employees did not escalate to the point of economic impracticality* (see 1 Larson, Workmen's Compensation Law, § 2.70, pp. 13-14). . . . [R]ealizing that a workable system of compensation could not totally redress an injured employee's injuries and remain a financially viable institution at the same time, a decision was reached whereby a limitation was placed on the amount of benefits recoverable by a compensation claimant (see Workmen's Compensation Law, §§ 12, 15, subd. 2)." *Granger* v. *Urda,* 44 N.Y.2d 91, ——, 404 N.Y.S. 2d 319, 321, 375 N.E.2d 380, 382 (1978) (emphasis added).

This concern with cost containment is understandable because costs have been most significant, particularly when one considers that only small percentages of injured workers would have ever recovered damages under common law.[9] In 1971, before the passage of the 1972 Amendments, premiums cost employers just over $4 billion. The cost for 1977 has been estimated to be some $10 billion.[10]

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[9] *See* National Commission Compendium at 11 (estimating that not more than 15 percent of injured employees ever recovered damages under the common law).

[10] National Council on Compensation Insurance, Annual Report of the National Council on Compensation Insurance ii (1978). These figures do not include the premiums paid in the six "monopolistic funds" states where workers' compensation insurance is provided solely by state-operated carriers. *See* note 7 *supra.* Nor do they include the cost of workers' compensation to those companies which are self-insured. Obviously, therefore, the costs are even greater than the cited figures suggest.

To effectuate the goals described above, workers' compensation statutes have consistently imposed a ceiling on both weekly death benefits and disability benefits. In some instances, the maximum has been expressed as a fixed dollar amount; and more recently in many states, as a percentage of the state's average weekly wage.[11] These limitations reflect the principle that the system was never intended to replace in full the high incomes earned by employees in the highest income categories, but only to provide reasonable compensation to all employees. They have been an important means by which the employer's liability is kept certain and within fixed limits and by which the system has remained practical.

B. *The Maximum Weekly Benefits Under the Act Provide for Most Generous Compensation.*

As noted, the maximum weekly benefits under the longshoremen's Act provide for most generous compensation. These benefits, which are presently $367.22 per week, will steadily increase over the years. Indeed, the rate of escalation has recently been over 7 percent annually. Pursuant to Section 10(f) of the Act, 33 U.S.C. § 910(f), those

[11] National Commission Report at 33; *Director* v. *Boughman, supra,* 545 F.2d at 213. *See also* Brodie, *The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals,* 1963 Wis. L. Rev. 57, 58 (noting that the original acts placed maximums of $10-$15 per week).

The National Commission and the Model Act (published by the Council of State Governments) both recommended that the maximum limitation on death benefits and total disability benefits be based upon a percentage of the state's average weekly wage. National Commission Report at 64-65, 71. As of 1973, 13 states had set their maximum weekly disability benefits as a percentage of their average weekly wage, and the Federal Employees Compensation Act based its maximum on 75 percent of the pay of specified grade levels in the Federal Civil Service. National Commission Compendium at 116, 124. Only two of these jurisdictions did not also have flexible maximums for death benefits. *Id.* at 141. Today, 37 workers' compensation laws (including the Longshoremen's Act and the D.C. Code) provide for flexible maximums.

individuals entitled to survivors benefits will have their weekly benefits adjusted in accordance with the annual rate of escalation.

As set forth in Appendix C, respondents can thus expect to receive a total of some $746,786 in weekly death benefits. This assumes escalation of only 6 percent annually and life expectancy of just under 20 years. Obviously, if the benefits are paid over a longer period of time or if the escalation rate is higher, the total amount awarded is even greater. Appendix D, for example, illustrates a recent case arising in Illinois. As this demonstrater, a 44-year old spouse whose husband's average weekly wage was $1,404 could expect to receive the maximum award of $1,723,336, if the provisions of Section 6(b)(1) of the Longshoremen's Act were applied.

The maximum awards are, in short, most reasonable—particularly since they are given without regard to the employer's fault, constitute non-taxable income and are frequently supplemented by other benefits. These awards are more than sufficient to assure the type of continued income for which workers' compensation laws have been designed.

On the other hand, elimination of the maximums on weekly death benefits would result in awards which are unnecessarily and unjustifiably higher. For example, if the weekly maximum were removed, respondents could expect to receive an award which is nearly $400,000 or over 50 percent greater than the award limited by the Section 6(b)(1) maximums. *See* Appendix C. Similarly, in the Illinois case, the spouse could expect an award more than 100 percent or $2,200,000 higher. *See* Appendix D.

• • •

In short, while limitations on average weekly benefits prevent full replacement of incomes earned by employees in the highest income category, they also assure that there will be sufficient funds available to provide a reasonable amount to all employees. Accordingly, the workers' compensation laws, including the Longshoremen's Act, have consistently provided for maximums on weekly death benefits. Elimination of such maximums would constitute a most significant and drastic change which would be wholly inconsistent with the historical development of the workers' compensation system.

II.

The Ninth Circuit's Interpretation of the Act Violates Fundamental Principles of Statutory Construction.

A. *The Ninth Circuit's Interpretation Renders Section 6(d) Meaningless.*

As a result of the 1972 Amendments, the fixed dollar maximums previously contained in Section 9(e) for weekly death benefits and in Section 6(b) for weekly disability benefits were removed. However, two new provisions dealing with maximums were added. Section 6(b)(1) provides that compensation for "disability" shall not exceed the following percentages of the "applicable national average weekly wage":

> "(A) 125 percentum or $167, whichever is greater, during the period ending September 30, 1973.
>
> "(B) 150 percentum during the period beginning October 1, 1973, and ending September 30, 1974.
>
> "(C) 175 percentum during the period beginning October 1, 1974, and ending September 30, 1975.
>
> "(D) 200 percentum beginning October 1, 1975."

The other provision added by the 1972 Amendments, Section 6(d), provides:

> "(d) Determinations under this subsection with respect to a period shall apply to employees *or survivors* currently receiving compensation for permanent total disability *or death* benefits during such period, as well as those newly awarded compensation during such period." (Emphasis added.)

The Third and District of Columbia Circuits both construed "determinations under this subsection" as referring to the determinations required by Section 6 of the Act, including Section 6(b)(1).[12] As the Third Circuit noted, the "meaning" of Section 6(d) "thus becomes apparent":

> "Under § 6(b)(1)(B) benefits awarded between October 1, 1973 and September 30, 1974 may not exceed 150 per cent of the national average weekly wage. Thereafter, benefits awarded beginning October 1, 1974 and ending September 30, 1975 cannot exceed 175 per cent of the national average wage under § 6(b)(1)(C). Section 6(d) serves to insure that the recipients of either disability *or* death benefits during the phase-in period will receive the current maximum for that period regardless of whether they have been receiving such benefits since an earlier period or whether they were just awarded compensation during that period. Therefore, a person awarded benefits during the § 6(b)(1)(B) period and limited by the maximum of 150 per cent of the national average weekly wage will be subject to the new maximum of 175 per cent of

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[12] The amendments to Section 6 were contained in Subsection (a) of Section 5 of the 1972 Amendments. There is, accordingly, no question that the term "this subsection" in Section 6(d) refers to Section 6 of the Act. *See Director* v. *O'Keefe, supra,* 545 F.2d at 344; *Director* v. *Boughman, supra,* 545 F.2d at 215. Nor can it be seriously disputed that Section 6(b)(1) requires "[d]eterminations . . . with respect to a period." *See Director* v. *O'keefe, supra,* 545 F.2d at 344.

the national average weekly wage from the beginning of the § 6(b)(1)(C) period just as someone awarded benefits during the § 6(b)(1)(C) period." 545 F.2d at 344-45.

The Ninth Circuit, on the other hand, held that "determinations under this subsection" referred only to those determinations of national average weekly wage required by Section 6(b)(3),[13] and that the reference to "death benefits" meant the *minimum* death benefits specified in Section 9(e).[14] According to the court, Section 6(d) thus had a "clear limited meaning":

> "[*A*]*ll it says* is that the Secretary's determination of national average weekly wages with respect to a certain period shall not only apply to those who first begin receiving compensation during that period, but shall also apply to those who are already receiving benefits." 567 F.2d at 1388 n.5. (Emphasis added.)

It is impossible to discern the basis for the *ipse dixit* that Section 6(d) has the "clear limited meaning" which the

[13] Section 6(b)(3), which was also added by the 1972 Amendments, provides in relevant part:

> "(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of each year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year."

[14] When Congress amended Section 9(e) it also eliminated the fixed dollar minimum on weekly death benefits and replaced it with a minimum tied to the national average weekly wage. As amended, Section 9(e) provides: "In computing death benefits the average weekly wage of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in Section 906(b) of this title but the total weekly benefits shall not exceed the average weekly wages of the deceased. . . ."

Ninth Circuit ascribed to it. As the Third Circuit observed, there is absolutely

> "nothing in the text of § 6(d) from which we can conclude that the 'determinations' to which § 6(d) refers, extend solely to the calculation of the national average weekly wage and not to the [Section 6(b)(1)] phase-in limitations upon benefits." 545 F.2d at 345-46.

As the decisions of the Third and District of Columbia Circuits also make clear, the Ninth Circuit's construction of Section 6(d) renders that provision duplicative of Section 10(f) of the Act and therefore "superfluous in the statutory scheme." Section 10(f), 33 U.S.C. § 910(f),[15] which was added by the 1972 Amendments, provides for annual upward adjustments in minimum death benefits based upon changes in the national average weekly wages. "A mathematical calculation reveals that the effect of § 10(f) is identical to that of § 6(d) under [the Ninth Circuit's theory]." *Director* v. *O'Keefe, supra* note 2, 545 F.2d at 346.[16] Such a result violates the most elementary

[15] Section 10(f) states:

> "(f) Effective October 1 of each year the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after the date of enactment of this subsection shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1."

[16] Referring to the Review Board's construction of Section 6(d) in this case, which is identical to the Ninth Circuit's construction, the District of Columbia Circuit similarly concluded that:

> "Persons receiving the minimum death benefits (like all others 'currently receiving compensation for permanent total disability or death benefits') are unquestionably entitled to increases in compensation each October 1 by Section 10(f)

canons of statutory construction, which require that every portion of a statute be interpreted to give it independent meaning. *United States* v. *Menasche,* 348 U.S. 528, 538-39 (1955); *Jarecki* v. *G. D. Searle & Co.,* 367 U.S. 303, 307-08 (1961).

B. *The Ninth Circuit's Interpretation Leads to Absurd Results.*

The Ninth Circuit has construed the Act as eliminating the maximum on weekly death benefits, while at the same time retaining a maximum on weekly disability benefits. As the Ninth Circuit itself recognized, this construction puts "'a premium on death'" so that "'a totally disabled employee, in need of continuing care, [is] compensated less generously than the family of an employee who dies.'" 567 F.2d at 1387. Under this construction, families of certain disabled employees who later die from *unrelated* causes would suddenly receive an increase in benefits. *See* 33 U.S.C. § 909 (requiring the payment of death benefits "if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury"). The court's holding that survivors of a deceased employee are in a position superior to all the claimants under the Act "creates a serious and unique anomaly." *Director* v. *Boughman, supra,* 545 F.2d at 213.

Accordingly, the Act has consistently placed similar maximums on weekly death benefits and disability bene-

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of the Act as amended. Such increases pursuant to Section 10(f) are equal to those that would be arrived at by the effect of Section 6(d) as construed by the Board. Thus if Section 6(d)'s statement that the newly determined national average wage is applicable to survivors currently receiving death benefits has no meaning beyond that to which it was limited by the Board, it is entirely duplicative of and included in Section 10(f)." 545 F.2d at 216.

fits.[17] State workers' compensation laws have also consistently imposed maximums on both weekly death and disability benefits. The National Commission, in recommending this approach, explained that "the arguments . . . concerning the maximum weekly benefits for temporary and permanent disabilities are equally applicable for death cases. . . ." National Commission Report at 71.[18] To the

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[17] Under Section 8 of the original Act, disabled employees were entitled to 66⅔ percent of their average weekly wages. Act of March 4, 1927, c. 509, 44 Stat. 1424, 1427-29. Section 6(b), however, placed a maximum of $25 on these weekly benefits. 44 Stat. 1426. Under Sections 9(b)-(d) of the original Act, the total amount payable to survivors could not exceed 66⅔ percent of the deceased's average weekly wages. 44 Stat. 1430. Section 9(e), however, provided: "In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $37.50. . . ." 44 Stat. 1430. Thus, notwithstanding the wages actually earned by the deceased, his survivors were entitled to a maximum benefit of $25 per week (66⅔ percent of $37.50), which was precisely the same benefit to which disabled employees were entitled. While Congress often amended these provisions to increase the dollar amounts, it steadfastly retained the same relationship which the maximum weekly award for death bore to the maximum weekly award for disability. *See* Act of July 14, 1961, Pub. L. No. 87-87, §§ 1 and 2, 75 Stat. 203 ($70 and $105, respectively); Act of July 26, 1956, c. 735, §§ 1 and 4, 70 Stat. 654, 655 ($54 and $81, respectively); Act of June 25, 1948, c. 623, §§ 1 and 3, 62 Stat. 602 ($35 and $52.50, respectively); Act of March 4, 1927, c. 509, §§ 6(b) and 9(e), 44 Stat. 1426, 1430 ($25 and $37.50, respectively).

[18] This Court has also recognized that, given the purposes of workers' compensation, there is no basis for distinguishing between death benefits and disability benefits. In *Madera Sugar Pine Co.* v. *Industrial Accident Comm'n,* 262 U.S. 499 (1923), the Court stated:

> "Provision is universally made in workmen's compensation acts for compensation not only to disabled employees but to the dependents of those whose injuries are fatal. And *the two kinds of payment are 'always regarded as component parts of a single scheme of rights and liabilities arising out of' the relation of employer and employee. . . .* The object of such acts 'is single—to provide for the liability of an employer to make compensation for injuries received by an employee', whether to the employee himself or to those who suffer pecuniary loss by reason of his death." 262 U.S. at 501 (emphasis added.)

extent that any distinction can be made, there is a stronger economic basis for imposing a maximum on death benefits than on disability benefits:

> "'Although death is the ultimate work-related tragedy, the economic loss associated with death cases is often less than that of a permanent total disability.'" *Director* v. *Boughman, supra,* 545 F.2d at 213 n.8.

Accordingly, those states that have made a distinction have imposed a higher maximum on weekly disability benefits than on weekly death benefits. *Compare* United States Chamber of Commerce, Analysis of Workmen's Compensation Laws Chart V (1977), *with id.* Chart VII.

In short, it has never been the policy of the Longshoremen's Act or the other workers' compensation laws to place a premium on death. The Ninth Circuit, however, has adopted a construction of the Act which, it observes, has precisely this effect. This unique and unprecedented result has no basis in the workers' compensation system. Certainly, in the absence of any clear indication that Congress intended such a result, the Ninth Circuit's construction is improper.

III.

The Ninth Circuit's Construction of the Longshoremen's Act Is Neither Supported by Nor Consistent With the Legislative History of the 1972 Amendments.

In determining that the Act imposed no maximum on weekly death benefits, the Ninth Circuit referred to various passages in the House and Senate reports accompanying the 1972 Amendments.[19] These passages, however,

[19] For example, the court quoted the following section-by-section description in the House Report:

establish no more than that Congress intended to remove the *fixed dollar maximum* on weekly death benefits which had appeared in Section 9(e) of the original Act.[20] They do not address the issue in this case—whether, by virtue of Section 6(d), Congress replaced the fixed dollar maximum with the flexible maximums set forth in Section 6(b)(1).[21]

The Ninth Circuit also referred to various statements made regarding the proposed elimination of maximums by the bills as originally introduced into the Ninety-Second Congress. 567 F.2d at 1388-89. What the court failed to note, however, is that these bills were substantially revised

> "'Subsection (d) of this section amends section 9(e) of the Act, eliminating the dollar minimum and maximum set out under persent [sic] law for the average weekly wages of the deceased to be used in computing death benefits. The minimum substituted by this amendment is the applicable national average weekly wage as prescribed in section 6(b) of the Act, except that the total weekly benefits may not exceed the actual average weekly wages of the deceased.'" 567 F.2d at 1389 n.7, *quoting* H.R. Rep. No. 1441, 92d Cong., 2d Sess. 19 (1972).

[20] The D.C. Circuit, in *Director* v. *Boughman,* observed that the langauge quoted in note 19 *supra* is no more than a "straightforward explanation of the literal effect of Section 10(d) of the amendments on Section 9(e) of the Act taken by itself." 545 F.2d at 214. *See also Director* v. *O'Keefe, supra,* 545 F.2d at 344 n.14 (House Report "merely restates the obvious effect on the 1972 amendments upon § 9").

[21] Referring to the legislative history upon which the Ninth relied, *see* note 19 *supra,* the D.C. Circuit further concluded:

> "Although the House Committee's description is perfectly accurate, therefore, in saying that the maximum limitations formerly contained in Section 9(e) were eliminated, this does not even face the question of whether the maximum limits contained in Section 6(b)(1) of the Act are applicable to death benefits. Certainly Congress intended to eliminate any maximum *dollar* limitation on death benefits. Yet the real issue is whether Congress intended to eliminate all maximums on death benefits or just to change the nature of the maximum. On this issue the Committee's statement . . . is unpersuasive either way." 545 F.2d at 214.

after opposition to elimination of the maximum benefits surfaced during the hearings. Among the revisions was the addition of Sections 6(b)(1) and 6(d).

More specifically, two pairs of identical bills were introduced during the Ninety-Second Congress. The first pair would have removed the fixed dollar amounts in Sections 6(b) and 9(e) of the original Act and would not have replaced them with any other provision.[22] The other pair of bills would have retained, but increased, the fixed dollar maximums on both types of benefits, thereby continuing the pattern[23] of placing a maximum on compensation in disability cases which was 66⅔ percent of the maximum wages to be considered in death cases ($110 and $178, respectively).[24] It is significant to note, as did the D.C. Circuit, that notwithstanding their "considerable differences," each of these bills would have "continued to treat deaths and disabilities in the same way—either both subject to the same maximum or neither subject to any maximum except two thirds of the employee's wages." *Director* v. *Boughman, supra* note 2, 545 F.2d at 215.

During the hearings on the bills, there was substantial opposition to the elimination of weekly maximums on death and disability benefits. The Labor Department,[25] workers'

[22] S. 2318, 92d Cong. §§ 4(a) & 10(b) (as introduced); H.R. 12006, 92d Cong., §§ 4(a) & 10(b) (as introduced).

[23] *See* note 17 *supra*.

[24] S. 525, 92d Cong., §§ 4(a) and 8(c); H.R. 3505, 92d Cong., §§ 4(a) and 8(c).

[25] The then-Secretary of Labor, James D. Hodgson, for example, testified that the elimination of ceilings on weekly compensation would "stimulate litigation" and "complicate and delay administrative proceedings." Noting that the "principle of workmen's compensation is to minimize, not encourage litigation," the Secretary of Labor urged that the maximums be retained. *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525 and S. 1547 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92d Cong., 2d Sess. 31 (1972) ("1972 Senate Hearings").

compensation carriers,[26] and employers,[27] all testified in opposition to this proposal.[28] Furthermore, on July 31,

[26] The American Insurance Association ("AIA") submitted a statement urging that "some reasonable ceiling" be placed on weekly compensation." The AIA wrote:

> "Benefits under the Longshoremen's and Harbor Workers' Act are applicable to the District of Columbia. There are many highly paid executives working in the District. The compensation system is not designed primarily for their protection, yet large payments in such cases would add substantially to the cost of compensation." (Footnote omitted.)

Longshoremen's and Harbor Workers' Compensation Act. Hearings on H.R. 247, H.R. 3505, H.R. 12006 and H.R. 15023 Before the Select Subcommitttee on Labor of the House Education and Labor Committee, 92d Cong., 2d Sess. 331 (1972) (1972 House Hearings). These views were also presented to the Senate. 1972 Senate Hearings at 714.

A representative of The American Mutual Insurance Alliance (now named the Alliance of American Insurers) similarly testified:

> "There is also widespread agreement that a reasonable maximum limit on weekly cash benefits is consistent with the objectives of workmen's compensation, . . . [Workers' compensation is not] intended to replace in full the high incomes earned by employees in the highest income categories. To do so would be costly and inappropriate in a system providing benefits to all injured employees without regard to their own negligence." 1972 House Hearings at 228 (testimony of Andre Maisonpierre). *See also id.* at 230; 1972 Senate Hearings at 234-35.

[27] For example, representatives of the Shipbuilders Council of America and the National Maritime Compensation Committee suggested that, consistent with the recent action of a number of states, the maximum should be tied to the average weekly wage in the shipbuilding and ship repair industry. 1972 Senate Hearings at 171-72, 175, 182-83, 203-04, 218 (testimony of Ralph Hartman); *id.* at 318-23, 334 (testimony of Edward Vickery).

[28] *See also* 1972 Senate Hearings at 164 (testimony of Joseph Koonz) (observing that some members of the Senate Committee expressed "concern" over the absence of a maximum on weekly benefits).

1972, immediately after the close of the hearings, the National Commission released its Report. The National Commission recommended that both weekly disability and death benefits be limited, after an appropriate phase-in period, to 200% of the State's average weekly wage. National Commission Report at 72.

These views obviously had an impact. On September 13, 1972, the Senate Committee on Labor and Public Welfare reported a substantially revised version of S. 2318, which was ultimately passed by the Senate and House.[29] This version did eliminate the fixed dollar maximum on weekly death and disability benefits which had appeared in Sections 9(c) and 6(b), respectively. Unlike the earlier proposed bills, however, the revised version amended Section 6 of the Act by adding two new provisions—Section 6 (b)(1) and Section 6(d). Thus, statements about the effect of the bills as introduced also provide no assistance in discerning the effect of Sections 6(b)(1) and 6(d).

There is, in short, absolutely no support for the Ninth Circuit's decision in the legislative history of the 1972 Amendments.[30] In fact the legislative history that exists is clearly to the contrary.

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[29] S. 2318 was passed by the Senate on September 14, 1972 (118 Cong. Rec. 30670, 30674). H.R. 12006 was passed by the House on October 14, 1972 (118 Cong. Rec. 36376, 36389), and returned to the Senate, which concurred in the House version (118 Cong. Rec. 36265, 36274).

[30] The Ninth Circuit suggested that Congress reached a compromise whereby it eliminated the maximum on death benefits but retained the maximum on disability benefits. There is, of course, nothing in the legislative history which even hints at such compromise. On the contrary, to the extent that Congress compromised, it did so by substantially increasing death benefits, while at the same time retaining the maximum on the weekly death benefits. For example, by tying the maximum and minimum (*see* 33 U.S.C. § 909(e)) death benefits to the national average weekly wage, Congress believed that approximately 90% of the covered employees would receive ⅔ of their average weekly wages; this represented a considerable increase over past practice. S. Rep. No. 92-1125, 92d Cong., 2d Sess. 5 (1972). In addition, Congress added Section 10(f) to the Act, 33 U.S.C. § 910(f), which provides for an annual readjustment of weekly benefits. Under Section 10(f) total disability and death benefits are automatically raised by the same percentage that the national average weekly wage has been raised. Furthermore, Congress increased the maximum on funeral expenses from $400 to $1,000. *See* 33 U.S.C. § 909(a). It also raised the percentage of average weekly wages that would be awarded to a widow from 35% to 50% and the percentage that would be awarded to surviving children from 15% to 16⅔%. This was, of course, subject to the same earlier limitation that the "total amount payable shall in no case exceed 66⅔ percentum" of the deceased's average weekly wage. 33 U.S.C. §§ 909(b)-(d). Congress also provided for survivor benefits where an employee with a permanent total disability dies from an unrelated cause. *See* 33 U.S.C. § 909.

First, both the Senate and House Committees, as well as Senator Williams, the principal Senate sponsor of the 1972 Amendments, explained the amendment to Section 6 of the Act as follows:

> "To the extent that employees receiving compensation for total permanent disability *or survivors receiving death benefits* receive less than the compensation they would receive if there were no phase-in, their compensation is to be increased *as the ceiling moves to 200 percent.*" (Emphasis added).[31]

The references to "phase in," "ceiling" and "200 percent" make no sense whatsoever unless the Section 6(b)(1) limitations apply to weekly death benefits. Thus, as this language makes clear, those responsible for the 1972 Amendments recognized that the phase-in period limitations of Section 6(b)(1) would place a ceiling on the maximum benefits which "survivors" might otherwise have received.

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[31] S. Rep. No. 92-1125, 92d Cong., 2d Sess. 5 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 3 (1972).

Senator Williams' remarks are set forth at 118 Cong. Rec. S. 18272 (daily ed., Oct. 14, 1972).

This language "dispels any notion that § 6(d) was," as the Ninth Circuit held, "intended to relate only to minimum death benefits."[32] *Director* v. *O'Keefe, supra,* 545 F.2d at 346. *See also Director* v. *Boughman, supra,* 545 F.2d at 215-16.

Second, the Senate Committee noted that it had given "most careful consideration to the recommendations" contained in the report of the National Commission on State Workmen's Compensation Laws, and that its proposed amendments of Section 6 were "fully consistent" with these recommendations. S. Rep. No. 92-1125, 92d Cong., 2d Sess. 2 & 5 (1972). It is simply impossible to reconcile this statement with the Ninth Circuit's construction of the Act. Among the most significant of the National Commission's recommendations was that both weekly disability and death benefits be limited, after an appropriate phase-in period, to "at least 200 per cent of the State's average weekly wage." *See* page 28 *supra.* There is absolutely nothing in the legislative history of the 1972 Amendments indicating that Congress intended to reject this recommendation with respect to death benefits, while at the same time fully adopting the recommendation with respect to disability benefits. *Director* v. *Boughman, supra,* 545 F.2d at 215 n.15. *See also Director* v. *O'Keefe, supra,* 545 F.2d at 347.

Third, a careful review of the legislative history of the 1972 Amendments fails to reveal any instance where Con-

[32] The Ninth Circuit itself felt constrained to admit that the language in the Committee reports "suggests that the gradual increase in the maximum limitations provided by [Section 6(b)(1)] should apply to survivors as well as to disabled employees." 567 F.2d at 1388 n.5. The court, however, attempted to explain this language away by declaring that it is "ambiguous" and "outweighed" by the other legislative history. *Id.*

gress expressed an intent to distinguish between death benefits and disability benefits. This is most significant. Since its passage in 1927 the Act consistently treated weekly death benefits and disability benefits in the same manner by imposing a maximum on each. *See* note 17, *supra.* As the D.C. Circuit explained in rejecting the position of the Ninth Circuit,

> "Foremost among our reasons for reaching this conclusion is the common-sense conviction that Congress did not intend to provide, without ever so stating and in sharp contradistinction to every previous version of the Act, that a totally disabled employee in need of continuing care, should be compensated less generously than the family of an employee who dies." 545 F.2d at 213.

Fourth, subsequent to the passage of the 1972 Amendments, the Senate Subcommittee responsible for these Amendments noted that weekly death benefits under the 1972 Act are limited by the Section 6(b)(1) maximums. In its Compilation of Selected Labor Laws Pertaining to Labor Relations (1974), the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare noted:

> *"Amount of Benefits"*
>
> *"Compensation for disability and death is based on the average weekly wage of the injured worker. Maximum benefits may not exceed a specified percentage of the national average weekly wage.* The percentage increases from 125 prior to September 30, 1973, to 200 beginning October 1, 1975. The minimum is 50% of the national average weekly wages or the employees' actual weekly wage, whichever is less." *Id.* at 469. (Emphasis added.)

This observation, which is persuasive extrinsic evidence of congressional intent, *see Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-81 (1969), was not even mentioned by the Ninth Circuit.

Finally, as discussed above, limitations on weekly death benefits have traditionally been an integral part of the workers' compensation system. It is unthinkable that Congress would have repealed such a fundamental aspect of the system without clearly expressing an intent to do so.

Conclusion

For the foregoing reasons, Amici submit that the Ninth Circuit's construction of the Longshoremen's and Harbor Workers' Compensation Act is wrong. As the Courts of Appeals for the Third and District of Columbia Circuits have held, weekly death benefits are subject to the maximums set forth in Section 6(b)(1) by virtue of Section 6(d). The decision of the Ninth Circuit should, therefore, be reversed.

Respectfully submitted,

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Appendices

APPENDIX A

Longshoremen's and Harbor Workers' Compensation Act (Prior to 1972 Amendments)

Before its amendment in 1972, the Longshoremen's and Harbor Workers' Compensation Act provided in relevant part:

Section 6(b):

> (b) Compensation for disability shall not exceed $70 per week and compensation for total disability shall not be less than $18 per week: *Provided, however,* That if the employee's average weekly wages, as computed under section 910 of this title, are less than $18 per week, he shall receive as compensation for total disability his average weekly wages.

Sections 9(b) & (e):

> If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:
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> • • • • •
>
> (b) If there be a surviving wife or dependent husband and no child of the deceased, to such surviving wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 15 per centum of such wages for each such child; in the case of the death or remarriage of such surviving wife or dependent husband, if there be one surviving

child of the deceased employee, such child shall have his compensation increased to 35 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 35 per centum of such wages increased by 15 per centum of such wages for each child in excess of one: *Provided,* That the total amount payable shall in no case exceed 66⅔ per centum of such wages. • • •

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(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased.

APPENDIX B

Longshoremen's and Harbor Workers' Compensation Act (Subsequent to 1972 Amendments)

As amended by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251, the Act now provides in relevant part:

Sections 6(b) & (d):

(b)(1) • • • [C]ompensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

(A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.

(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1975.

(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

(D) 200 per centum beginning October 1, 1975.

(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 910 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average

weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972.

• • • • •

(d) Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

Sections 9(b) & (e):

If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

• • • • •

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16⅔ per centum of such wages for each such child; in the case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child

shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16⅔ per centum of such wages for each child in excess of one: *Provided,* That the total amount payable shall in no case exceed 66⅔ per centum of such wages. • • •

• • • • •

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.

Section 10(f):

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after the date of enactment of this subsection shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

APPENDIX C

Comparison of Death Benefits With and Without Maximum Weekly Limitation— Rasmussen v. Geo Control, Inc.

Year[1]	Age of Spouse[2]	Age of Child[3]	Weekly Benefits[4] With Maximum[5]	Weekly Benefits[4] Without Maximum[6]	Annual Benefits[7] With Maximum	Annual Benefits[7] Without Maximum
1973	55	17	167.00	532.00	3,372	10,741
1974	56	18	210.54	563.92	10,948	29,324
1975	57	19	261.00	597.76	13,572	31,084
1976	58	20	318.38	633.62	16,556	32,948
1977	59	21	342.54	671.64	17,812	34,925
1978	60	22	367.22	711.94	19,095	37,021
				754.65		1,834
1979	61	23	389.25	565.99	20,241	28,056
1980	62	xx	412.61	599.95	21,456	31,197
1981	63	xx	437.36	635.95	22,743	33,069
1982	64	xx	463.61	674.10	24,108	35,053
1983	65	xx	491.42	714.55	25,554	37,157
1984	66	xx	520.91	757.42	27,087	39,386
1985	67	xx	552.16	802.87	28,712	41,749
1986	68	xx	585.29	851.04	30,435	44,254
1987	69	xx	620.41	902.10	32,261	46,909
1988	70	xx	657.64	956.23	34,197	49,724
1989	71	xx	697.09	1013.60	36,249	52,707
1990	72	xx	738.92	1074.42	38,424	55,870
1991	73	xx	783.25	1138.88	40,729	59,222
1992	74	xx	830.25	1207.21	43,173	62,775
1993	75	xx	880.06	1279.65	45,763	66,542
1994	76	xx	932.87	1356.43	48,509	70,534
1995	77	xx	988.84	1437.81	51,420	74,766
1996	78	xx	1048.17	1524.08	54,505	79,252
1997	79	xx	1111.06	1615.52	39,865	57,965
					746,786	1,144,064

[1] Benefits are computed from date of death, i.e., May 11, 1973. For purposes of these calculations, the "year" ends on September 30th. *See* 33 U.S.C. § 906 (b) (1).

[2] Spouse was born on February 1, 1918. Life expectancy at Age 60 is 19.69 years.

[3] Child was born on October 17, 1955. He receives benefits until Age 23. *See* 33 U.S.C. § 909 (b).

[4] Includes escalation factor, *see* 33 U.S.C. § 910 (f), of 6% per annum.

[5] Maximums are those set forth in 33 U.S.C. § 906 (b) (1). Average weekly wage at time of death was $798.

[6] Maximums are calculated as 50% of average weekly wage for spouse and 16⅔% of average weekly wage for child. *See* 33 U.S.C. § 909 (b).

[7] Annual benefits are calculated as 52 times the weekly benefits for years 1974-1978 and 1980-1996. For 1973, the annual benefits are calculated as (.3883 years x 52 weeks, see note *1* supra) times the weekly benefits. For 1979, the annual benefits are calculated as (.0467 years x 52 weeks, see note *3* supra) times the weekly benefit payable while the child is eligible for benefits plus (.9533 years x 52 weeks) times the weekly benefit of the spouse; see note *6* supra. For 1997, the annual benefits are calculated as (.69 yeas x 52 weeks, see note *2* supra) times the weekly benefits.

Source: National Council on Conpensation Insurance.

APPENDIX D

Comparison of Death Benefits With and Without Maximum Weekly Limitation— Fireman's Fund Insurance Co. Case No. H 640 C 777281

Year[1]	Age of Spouse[2]	Age of Child[3]	Weekly Benefits[4] With Maximum[5]	Weekly Benefits[4] Without Maximum[6]	Annual Benefits[7] With Maximum	Annual Benefits[7] Without Maximum
1976	44	9	318.38	936.05	12,961	38,107
1977	45	10	342.54	992.21	17,812	51,595
1978	46	11	367.22	1051.75	19,095	54,691
1979	47	12	389.25	1114.85	20,241	57,972
1980	48	13	412.61	1181.74	21,456	61,450
1981	49	14	437.36	1252.65	22,743	65,138
1982	50	15	463.61	1327.80	24,108	69,046
1983	51	16	491.42	1407.47	25,554	73,188
1984	52	17	520.91	1491.92	27,087	77,580
1985	53	18	552.16	1581.44	28,712	82,235
1986	54	19	585.29	1676.32	30,435	87,169
1987	55	20	620.41	1776.90	32,261	92,399
1988	56	21	657.64	1883.52	34,197	97,943
1989	57	22	697.09	1996.53	36,249	103,820
				2116.32		45,861
1990	58	23	738.92	1587.15	38,424	48,138
1991	59		783.25	1682.38	40,729	87,484
1992	60		830.25	1783.33	43,173	92,733
1993	61		880.06	1890.33	45,763	98,297
1994	62		932.87	2003.75	48,509	104,195
1995	63		988.84	2123.97	51,420	110,446
1996	64		1048.17	2251.41	54,505	117,073
1997	65		1111.06	2386.49	57,775	124,097
1998	66		1177.72	2529.68	61,241	131,543
1999	67		1248.39	2681.46	64,916	139,436
2000	68		1323.29	2842.35	68,811	147,802

Year[1]	Age of Spouse[2]	Age of Child[3]	Weekly Benefits[4] With Maximum[5]	Weekly Benefits[4] Without Maximum[6]	Annual Benefits[7] With Maximum	Annual Benefits[7] Without Maximum
2001	69		1402.69	3012.89	72,940	156,670
2002	70		1486.85	3193.67	77,316	166,071
2003	71		1576.06	3385.29	81,955	176,035
2004	72		1670.62	3588.40	86,872	186,597
2005	73		1770.86	3803.71	92,085	197,793
2006	74		1877.11	4031.93	97,610	209,660
2007	75		1989.74	4273.85	103,466	222,240
2008	76		2109.12	4530.28	109,674	235,575
2009	77		2235.67	4902.09	73,241	157,316
					1,723,336	3,967,395

[1] Benefits are computed from date of death, i.e., Dec. 19, 1975. For purposes of these calculations, the "year" ends on September 30th. *See* 33 U.S.C. § 906 (b) (1).

[2] Spouse was born in 1931. Life expectancy at Age 46 is 31.63 years.

[3] Children were born March 1, 1966, and January 1, 1959. They receive benefits until Age 23. *See* 33 U.S.C. § 909 (b).

[4] Includes escalation factor, *see* 33 U.S.C. § 910 (f), of 6% per annum.

[5] Maximums are those set forth in 33 U.S.C. § 906 (b) (1). Aveage weekly wage at time of death was $1404.

[6] Maximums are calculated as 50% of average weekly wage for spouse and 16⅔% of average weekly wage for child. *See* 33 U.S.C. § 909 (b).

[7] Annual benefits are calculated as 52 times the weekly benefits for years 1977-1989 and 1991-2008. For 1976, the annual benefits are calculated as (.7828 years x 52 weeks. See note *1* supra) times the weekly benefits. For 1990, the annual benefits are calculated as (.4167 years x 52 weeks, see note *3* supra) times the weekly benefit payable while the child is eligible for benefits plus (.5833 years x 52 weeks) times the weekly benefit of the spouse; see note *6* supra. For 2009, the annual benefits are calculated as (.63 years x 52 weeks, see note *2* supra) times the weekly benefits.

Source: National Council on Conpensation Insurance.